53d GRADUATE COURSE

UNLAWFUL COMMAND INFLUENCE

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LTC Patricia Ham

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Outline of Instruction

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II. REFERENCES.

A. Manual for Courts-Martial, United States (2002).

B. Uniform Code of Military Justice, arts 1, 25, 37, 98, 134 (para. 96a).

C. Dep't of Army, Reg. 27-10, Legal Services, Military Justice, paras. 5-9, 5-10c (6 September 2002).

III. PRIMARY SOURCES

A. Art. 37(a):

> "No [convening] authority . . . nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel . . . [regarding] the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions . . .. No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case . . .."

B. Art. 37(b): May not comment on court-related duties "of any . . . member of a court-martial."

1. Art. 25(d)(2): Convening authority [CA] shall choose members "best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament."

2. Art. 98: "Any person who . . . (2) knowingly and intentionally fails to enforce or comply with any provision of [the UCMJ] regulating the proceedings before, during, or after trial of an accused**;** shall be punished as a court-martial may direct."

C. **Keys to understanding** unlawful command influence [UCI].

1. See the commander as a **judicial authority**. Commanders must think differently about justice matters than they do about operational matters.

2. **Independent Discretion** at every stage of proceedings.

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4. UCI may be **actual** or **apparent**.

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D. **Framework** of analysis:

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F. Overview.

1. **Broad sweep:** "This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings . . . must be condemned." *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

2. **Narrow sweep:**

a. Art. 37 applies only to the ***adjudicative*** process of courts-martial, not the ***accusative*** process. *United States v. Drayton*, 45 M.J. 180 (1996). Relying on *United States v. Bramel*, 29 M.J. 958 (A.C.M.R.) *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

b. Waiver now permitted during pretrial phase of courts-martial. *United States v. Drayton*, 45 M.J. 180 (1996).

IV. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

Each judicial authority, at every level, is vested with independent discretion, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander because there are tools available to *lawfully* influence judicial matters.

A. Lawful command actions. Commanders MAY:

1. Personally dispose of a case if within commander's authority or any subordinate commander's authority. R.C.M. 306(c).

2. Send a case back to a lower-level commander for that subordinate's independent action. R.C.M. 403(b)(2), 404(b), 407(a)(2). Superior may not recommend to subordinate how to dispose of a case. R.C.M. 401(c)(2)(B).

3. Send a case to a superior commander with a recommendation for disposition. R.C.M. 401(c)(2)(A).

4. Withdraw subordinate authority on individual cases, types of cases, or generally. R.C.M. 306(a) (e.g. by rank: officers, senior NCOs; by crime: DUI, drugs, fraternization, trainee abuse).

5. Escalate a lower disposition.

a. "Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." R.C.M. 601(f). *Accord*, *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983).

b. **Exceptions:**

(1) An *executed* Art. 15 for *minor* offenses. R.C.M. 907(b)(2)(D)(iv); MCM Part V, para 1e. *See United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (superior commander may prefer charge for a *major offense* even though accused already received Art. 15 for the offense).

(2) After evidence is presented at trial, extremely limited authority to escalate disposition, *e.g.*, urgent and unforeseen military necessity. Art. 47 (former jeopardy); R.C.M. 604(b), 907(b)(2)(C).

B. Recurring mistakes:

1. Advice before the offense (policy letters).

a. Wing commander's "We Care About You" policy letter setting out reduction in grade and $500 fine "as a starting point" for first-time drunk drivers was clearly UCI, notwithstanding letter's preface that "[p]unishment for DWI will be individualized." *United States v. Martinez*, 42 M.J. 327, 331-334 (1995).

b. Improper for CG's physical fitness memo to include phrase "There is no place in the Army for illegal drugs or for *those who use them.*" *United States v. Rivers*, 49 M.J. 434 (1998). *See also United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956) (Policy of GCM for soldiers with two prior convictions constitutes unlawful interference with subordinate's independent discretion.).

2. Policies that seem to set tone of inflexibility.

a. Suggests preferred type of disposition.

b. May intimidate witnesses.

(1) *See, e.g., United States v. Griffin*, 41 M.J. 607 (Army Ct. Crim. App. 1994). Division commander's 5-page policy letter on physical fitness and training addressed drugs in following two sentences:

> "There is no place in our Army for illegal drugs ***or for those who use them.*** This message should be transmitted clearly to our soldiers, and we must work hard to ensure that we identify drug users through random urinalysis and inspections."

Result here (and not atypical elsewhere):

- defense extracted great deal (here and future cases).
- ACCA said it "would [not] require a military judge to undo the benefit to the accused of an excellent bargain extracted from the government."
- CA disqualified post-trial (even thought he withdrew drug specification as part of PTA). *But see United States v. Rivers*, 49 M.J. 434 (1998)

(corrective action by government and military judge saved case from UCI).

Other possible results:

- PTAs that address or waive UCI. *See United States v. Weasler*, 43 M.J. 15 (1995)(permissible to bargain away accusative stage UCI).

- Other CAs take action.

- "Acting" CA takes action.

- Liberal post-trial relief.

- Loss of convening authority powers (temp or permanent).

(2) *United States v. Bartley*, 47 M.J. 182 (1997) Lawyers drafted and 3-star convening authority (CA) signed poster that addresses "7 Defense Myths" about drug-related courts-martial. It was displayed in CA's waiting room and the SJA's outer office.

3. Advice after the offense.

a. *See United States v. Gerlich*, 45 M.J. 309 (1996). COL BDE commander/SPCMCA ordered subordinate (MAJ) to set aside Art. 15 after COL received letter from CG (who had received critical letter from IG) directing reinvestigation. Court set aside findings and sentence, notwithstanding COL's and MAJ's claims of continued independence, based on recognized "difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate."

a. *But see United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). Superior learned of additional misconduct by the accused and told subordinate commander, "You may want to reconsider the Article 15 and consider setting it aside based on additional charges." Court, relying on fully developed record, agreed with judge that subordinate "exercised his own independent discretion when he preferred charges."

b. Reconciling *Gerlich* and *Wallace*?

- Truly new evidence in *Wallace* that prompted (or at least justified) the re-look.

- Quantitatively less command pressure in *Wallace*, more legitimately permissive language.

- Strong evidence of prior independence by subordinate in *Wallace* on the record.

V. CONVENING AUTHORITY AS ACCUSER.

A. Accuser is "person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused." UCMJ, art. 1(9).

1. Test is whether under the circumstances "a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome. *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952); *United States v. Shelton*, 26 M.J. 787 (A.F.C.M.R. 1988); and *United States v. Dingis* , 49 M.J. 232 (1998).

2. Convening authority who possesses **more than an official interest** must forward the charges to a superior competent authority for disposition. UCMJ, art. 22(b), 23(b) (GCM and SPCM respectively); *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)(GCMCA was victim of burglary); *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)(accused attempted to blackmail GCMCA).

B. Exceptions:

1. Violations of general regulations. *United States v. Doyle*, 26 C.M.R. 82, 85 (C.M.A. 1958).

2. Nonjudicial punishment.

3. Summary Courts-Martial. R.C.M. 1302(b).

VI. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.

A. Pretrial (generally not disqualified).

1. Pretrial referral is a prosecutorial function. *Cooke v. Orser*, 12 M.J. 335, 343-44 (C.M.A. 1982).

2. *United States v. Treakle*, 18 M.J. 646, 654-55 (A.C.M.R. 1984) ("We do not agree . . . that a convening authority can be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament.").

B. Post-trial.

1. Accused is entitled "as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused's first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge." *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).

2. The presence of an inelastic attitude suggests that a convening authority (CA) will not adhere to the appropriate legal standards in the post-trial review process and that he will be inflexible in reviewing convictions because of his predisposition to approve certain sentences. *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987).

3. Still around. GCMCA said publicly that convicted airmen shouldn't "come crying" to him about their situations. CAAF took a different view. *United States v. Davis*, 58 M.J. 100 (2003).

4. Post-trial disqualification may be wise preemptive move. In *United States v. Crawford*, 47 M.J. 771 (C.G.Ct.Crim.App. 1997) the CA violated Art. 37's prohibition on censure of counsel when he told the DC, after trial in the presence of her client, that he "used" her and lied to her. That violation obviously had no effect on the trial, but likely would have disqualified the CA – given his evident temperament – from taking post-trial action. He disqualified himself, avoiding an issue.

5. Examples of problem areas:

   a. Division commander's letter stated that "all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, 'No, you are going to the Disciplinary Barracks . . for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" CA held to be disqualified to perform review function. *United States v. Howard*, 48 C.M.R. 939, 94 (C.M.A. 1974).

   b. *United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985), *aff'd*, 23 M.J. 153 (C.M.A. 1986) (summary disposition). Allegation that GCMCA stated that he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character, led court to conclude GCMCA did not possess the requisite impartiality to perform post-trial review function; action set aside.

VII. COURT MEMBER SELECTION.

A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ: **AGE, EDUCATION, TRAINING, EXPERIENCE, LENGTH OF SERVICE AND JUDICIAL TEMPERAMENT**.

1. *United States v. Upshaw*, 49 M.J. 111 (1998). Accused was not prejudiced by honest administrative mistake that resulted in systematic exclusion of E-6s from court member selection consideration. Effron J., dissenting: government was on notice of defect and must strictly comply with requirements of Article 25, UCMJ.

2. *United States v. White*, 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing. Majority finds that criteria for command selection is compatible with article 25d criteria.

3. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Memorandum from SPCMCA directing subordinate commands to nominate only E-7s and above for court-martial of E-3 constituted impermissible shortcut for Article 25(b) criteria. SPCMCA testified that his policy was based on experience level of typical E-7, although he admits that he might find an E-5 with proper qualifications. The court also observed that the SPCMCA's apparent bottom line categorical exclusion of E-5s and below violates the line drawn by CAAF at the grade of E-2. *See United States v. Yager*, 7 M.J. 171 (C.M.A. 1979). Appearance of systemic exclusion of qualified persons will be resolved in accused's favor. Government failed to demonstrate by clear and convincing evidence that no impropriety occurred in the member selection process.

B. Staff Assistance.

1. Staff and subordinate assistance in compiling a list of eligible court members is permissible. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992).

2. Commander must beware, however, of subordinate nominations not in accordance with Article 25. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991)(improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of "harsh discipline").

3. *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the list of court member nominees sent to the convening authority. The SJA and chief of justice based this action on fact that all four alleged conspirators to distribute cocaine and many witnesses came from the Medical Group. Decision to exclude came from desire to avoid conflicts and unnecessary challenges for cause. The court held that exclusion of the Group nominees did not constitute UCI. Motive of SJA and staff was to protect the fairness of the court-martial, not to improperly influence it. *See also United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003) (convening authority excluded all members of U.S. Army Ordnance Center and School).

C. Replacement of panel also requires that the CA use **only** Article 25 criteria. Even then, the CA must avoid using improper motive or creating the appearance of impropriety.

1. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ("the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated" to select members with intent to achieve harsh sentences.)

2. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (replacement of panel because of "results that fell outside the broad range of being rational").

VIII. NO OUTSIDE PRESSURE.

A. Education: AR 27-10, para. 5-10*c*, "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge . . .." *See also* UCMJ, art. 37(a) and R.C.M. 104 concerning permissible education.

United States v. Youngblood, 47 M.J. 338 (1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had "underreacted" to misconduct and "shirked leadership responsibilities," created "implied bias" among three senior court members in attendance. Court focused on impact of remarks on receiver rather than intent of sender (Commander and SJA never testified). Specifically, the court weighed heavily the following factors: Despite the member's response that they could disregard the comments, the majority concluded it is "asking too much" to expect members to adjudge sentence without regard for potential impact on their careers.

J. Crawford dissenting: "This case is another example of the clash that sometimes arises between the need for good order and discipline and the need to maintain an impartial system of military justice."

"The primary responsibility for the maintenance of good order and discipline . . . is saddled on commanders. . . . [P]ersonal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he chartered it through forbidden areas." Article 37(a)(1) permits instructional and informational military justice lectures. Selecting court members pursuant to Article 25 criteria "differs significantly from random selection of civilian jurors by voter-registration or driver's-license lists." Implied bias should be used only in "extreme situations," especially with the military's blue ribbon panel.

B. Command policy in the courtroom.

1. "[H]ere we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Through[sic] shalt not [use marijuana]." MJ's sentencing instruction, which related Army policy regarding use of illegal drugs, implicated UCI concerns and constituted plain error which was not waived by the defense failure to object; sentence set aside. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991).

2. *United States v. Stoneman*, 57 M.J. 35 (2002). SPCMCA sent email to subordinate commanders "declaring war on all leaders not leading by example." Email also stated the following: "No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up 'hot' for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT, …., -- all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty." At a subsequent leaders' training session, Cdr reiterated his concerns. After consulting with SJA, Cdr issued a second email to clarify the comments in the first. Cdr stated that he was expressing his concerns about misconduct, but emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, defense counsel initially sought to stay proceedings until a new panel could be selected. After denial of this request, defense counsel challenged all panel members from the brigade based on implied bias and potential for unlawful command influence. After extensive voir dire, MJ denied the challenge using R.C.M. 912 as the framework. ACCA reviewed *de novo* and determined no abuse of discretion by military judge in denying challenges and the omission of specific findings of fact and conclusion that email did not constitute UCI were harmless. The Court remanded for a *DuBay* hearing. Military judge should have used an unlawful command influence framework to determine the facts, decide whether those facts constituted unlawful command influence, and conclude whether the proceedings were tainted. Additionally, CAAF stressed that the ROT was insufficient to resolve a potential "appearance of unlawful command influence" issue.

3. *United States v. Baldwin*, 54 M.J. 308 (2001). Nine months after her court-martial, appellant filed affidavit alleging that GCMCA conducted OPDs and that he commented that officer court-martial sentences were too lenient and stated that the minimum should be at least one year. Appellant also alleged that her court-martial was interrupted by one of these sessions (mandatory for all officers assigned to the installation). Appellant asserted that these actions constituted UCI. The Court held that appellant's post-trial affidavit was sufficient to raise the issue, but insufficient record on which to decide the issue. Decision of the Army court was set aside and the record returned for limited hearing on the UCI issue.

4. *United States v. Harvey*, 60 M.J. 611 (N-M. Ct. Crim. App. 2004). During closing arguments of counsel, convening authority who selected members and referred case to trial entered courtroom and sat in the gallery. MJ correctly ruled that this fact alone did not raise the issue of UCI. Defense counsel's request for mistrial was properly denied; defense declined any other remedy, including *voir dire* of members on issue. "[A]ny suggestion that the members were focused on [the convening authority] is just that, a suggestion, assumption or speculation without deeper meaning and not supported by the record." Court encouraged military judges "to inquire into such matters and make appropriate findings of fact and opinions." *Compare to United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979) (military judge abused his discretion in denying mistrial where accuser's (company commander) presence throughout proceedings was "ubiquitous" and commander engaged in "patent meddling in the proceedings").

C. In the deliberation room.

1. Commander, during staff meeting, indicated his dissatisfaction with the results of courts-martial. Four officers attending the meeting sat on court-martial panel that day. SJA made full disclosure, resulting in extensive voir dire of four officers; one of four officers was excused on peremptory challenge. Additional allegation was that president, one of the four officers at the meeting, improperly exerted superiority in rank during the sentence deliberations (see below). *United States v. Reynolds,* 40 M.J. 198, 200 (1994). Fractured court affirmed.

2. Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606; *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to "enhance" an argument).

3. *Compare United States v. Reynolds*, 40 M.J. 198 (1994) (comments by senior panel member sarcastically referring to junior officer's rank and that junior was "condoning the use of drugs" was merely open and robust expression of opinion). Waiver may have played role in ultimate decision.

4. *United States v. Dugan*, 58 M.J. 253 (2003). Panel member reminded the rest of the panel that the sentence would be reviewed by the GCMCA and needed to make sure the sentence sent a consistent message, especially since their names would be identified as panel members. CAAF remanded the case for a sentence rehearing.

5. *United States v. Toohey*, 60 M.J. __, 2004 CCA LEXIS 221 (N-M. Ct. Crim. App. Sep. 30, 2004). Member's threat during deliberations that, "if you don't reconsider this, I'm leaving," after members originally voted for lighter sentence than that ultimately adjudged "does not in any way raise the specter of unlawful command influence." Court reasoned that threat was an empty one; member did not sign, rate, or provide input into any other member's fitness reports, nor was he the senior member of the panel; and most importantly, there is "no indication that [the member] attempted to use his grade, or invoke the grade of some higher authority, to influence the other members." Comment merely demonstrated that "the sentencing deliberations became somewhat heated." The allegation was raised more than a year after trial and included in defense clemency submissions.

D. Command interference with the power of the Judge.

United States v. Tilghman, 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Remedy: 18 months credit ordered against accused's sentence.

IX. WITNESS INTIMIDATION.

A. Direct attempts to influence witnesses.

1. *United States v. Gore*, 60 M.J. 178 (2004). Military judge did not abuse her discretion by dismissing charges and specifications with prejudice due to command interference with defense witnesses. Although the case was a guilty plea, Court found that because the interference occurred prior to the servicemember's entry of pleas, the convening authority's interference with potential witnesses affected both the ability to contest the charges and present a sentencing case. It was within the MJ's discretion to determine that dismissal with prejudice was the appropriate remedy in light of the egregious conduct of the convening authority as that remedy was within the permissible range of remedies available. Government did not contest that UCI occurred and was merely challenging the remedy.

2. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994): An officer witness for the accused testified that members of the Junior Officers Protection Association pressured him not to testify. A petty officer also was harassed and advised not to get involved. Finding: unlawful command influence with regard to the petty officer. No command influence with regard to the officer, because JOPA lacked "the **mantle of command authority;"** instead unlawful interference with access to witnesses. Courts increasingly cite this case as one of UCI landmarks.

3. *United States v. Gleason*, 43 M.J. 69 (1995). After hearing incriminating tape of "almost God-like" SGM, linking him to contract killer, battalion commander (LTC) made clear he believed accused was guilty, characterized TDS as "enemy" and made clear that witnesses should not testify on SGM's behalf (none did). Court found that command influence infected entire process, overturning sentence AND conviction.

   - Vague "command climate" indictment.

   - 3-2 vote; arguably tenuous link between commander's statements and lack of witnesses.

   - Infrequently cited since.

4. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told that they had "embarrassed" the unit. Court found UCI necessitated setting aside findings and sentence.

5. *United States v. Newbold*, 45 M.J. 109 (1996). Ship commander (LCDR) held all-hands formation at which he referred to four sailors accused of rape as "rapists," "scumbags" and "low-lifes." Repeated at additional formation and in meeting with woman crew members. Though no retraction, CAAF found no UCI because (a) he not a CA, (b) no panel members drawn from the ship in question [what about witnesses?], and (c) accused waived Art. 32 and pleaded guilty.

6. *United States v. Bartley*, 47 M.J. 182 (1997). Lawyers drafted and 3-star convening authority (CA) signed poster that addresses "7 Defense Myths" about drug-related courts-martial. It was displayed in CA's waiting room and SJA's outer office.

7. *United States v. Plumb*, 47 M.J. 771 (A.F.Ct. Crim. App. 1997) (worst case of government interference with witnesses the court has observed in its collective 90 plus years of military service).

B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, <u>despite</u> good intentions.

1. *See United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986). CG, 3d Armored Division, addressed groups over several months on the inconsistency of recommending discharge level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message received by many was "don't testify for convicted soldiers." Accordingly, these comments unlawfully pressured court-martial members and witnesses.

2. *United States v. Griffin*, 41 M.J. 607 (Army Ct. Crim. App. 1994). "No place for drugs, or those who use them" buried in division commander's 5-page policy letter on physical fitness and training.

3. Command policies versus military justice policies*: United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991). When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused charged with engaging in lesbian activities, the hesitancy of potential witnesses to testify in a companion or similar case was evidence of UCI.

X. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

A. Mass Apprehension. Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment. Violation of Art. 13; returned for sentence rehearing. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).

B. Pretrial Humiliation. Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute unlawful command influence; no showing that any witnesses were persuaded or intimidate from testifying. It did, however, violate Art. 13. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). *See also United States v. Stringer*, 55 M.J. 92 (2001).

See also United States v. Newbold, 45 M.J. 109 (1996). Ship commander rape as "rapists," "scumbags" and "low-lifes." CAAF found no UCI partly because (a) he not a CA, and (b) no panel members drawn from the ship in question.

XI. INDEPENDENT DISCRETION OF MILITARY JUDGE.

A. Prohibition: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." UCMJ, art. 37(a).

B. Efficiency Ratings: "[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ art. 26(c).

C. Questioning sentences.

United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge's decision are prohibited.

D. Subtle pressures.

1. Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983).

2. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge's letter, written to increase sentence severity, subjected judges to UCI.

3. *United States v. Campos*, 42 M.J. 253 (1995). Army judge raised issue that his reassignment from position of senior judge was based on perception of his leniency. Based on extensive record, CAAF found no nexus between assignment of more senior judge and accused's trial, no abuse in judge's not recusing himself.

Court: "we cannot countenance – indeed, we condemn – the calculated carping to the judge's judicial superiors about his sentencing philosophy," but no UCI found.

XII. REMEDIAL ACTIONS.

A. Raise Issue Immediately. ***Extremely important*** to litigate at trial level because:

1. Record built most efficiently here.

2. Courts will apply waiver.

a. Not shy about applying Art. 37 to adjudicative phase only (see above).

b. Be wary of counsel who hedge their bets. *See, e.g., United States v. Hill*, 46 M.J. 567 (A.F.Ct.Crim.App. 1997), even if SJA's order thwarting defense counsel's efforts to have accused view crime scene amounted to UCI, the defense waived the issue by failing to raise until 12 months after trial.

B. Before trial – Command Directed.

1. ***United States v. Rivers,*** 49 M.J. 434 (1998) and *United States v. Biagase,* 50 M.J. 143 (1999) provide excellent examples of corrective action taken by the government to overcome acts of unlawful command influence.

2. Brief Witnesses. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). In response to 1SG's criticism that those who testify on behalf of drug offenders contravene Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

3. Rescind or clarify letters and pronouncements. *See, e.g., United States v. Martinez*, 42 M.J. 327 (1995).

5. Transfer offending actors, or ensure no longer in witness rating chain.

6. Ban offenders from the courtroom.

C. At trial -- judge-directed.

1. *See Rivers and Biagase, supra.*

2. Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case. *United States v. Giarratano*, 22 M.J. 388, 399 (C.M.A. 1986).

3. *United States v. Clemons*, 35 M.J. 770, 773 (A.C.M.R. 1992):

a. No aggravation witnesses.

b. Not allowed to attack accused's credibility by opinion or reputation testimony.

c. Defense given wide latitude with witnesses.

d. Accused allowed to testify about what he *thought* witnesses might have said on merits or E&M without cross-*examination.*

4. *United States v. Southers*, 18 M.J. 795, 796 (A.C.M.R. 1984).

a. Government barred from presenting evidence about accused's potential for further service.

b. Judge offered to sustain any challenge for cause v. any member who was present in command during period of UCI.

D. Post-trial. R.C.M. 1102: Anytime before authentication or action the military judge or convening authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

1. New recommendation and action ordered. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974).

2. *DuBay* hearing ordered. *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988). *See also United States v. Rivers* 49 M.J. 434 (1998) (post-trial evidence gathered by military judge revealed no UCI by unit 1SG).

3. Findings and sentence overturned.

E. Remedial action may not work. Extremely important to litigate (at the trial court level) the adequacy of remedial actions.

XIII. METHODOLOGY OF ANALYSIS AND PROOF.

A. Framework for Analysis:

1. Stage of proceedings

2. Actor

3. Harm

4. Waiver

B. Raising the issue at the appellate level. **The 3 (arguably 4) prong test** comes from *Stombaugh*, 40 M.J. at 213, in which the CAAF adopted the test suggested by Judge Cox in his concurrence in *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J. concurring). The test is:

1. **Sufficient evidence**. "Sufficient facts which, if true, constitute" UCI. This language reappears in *Ayala* and elsewhere, reiterating the same or similar language from many other sources. Earlier the court had held, for example, that the defense must produce "sufficient to render a reasonable conclusion in favor" of the allegation of unlawful command influence. *United States v. Cruz*, 20 M.J. 873, 885-886 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

2. **The proceedings were unfair.**

3. **UCI is the proximate cause of the unfairness.** Prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial. *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994).

4. Not formally part of the test, but effectively so: the actor had the **"mantle of command authority."** *Stombaugh*, 40 M.J. at 211. This is effectively a screening criterion for further analysis: did the person said to have committed the UCI act with the "mantle …"? *Id.*

C. Burden does not shift to government unless defense meets "the initial burden of producing sufficient evidence to raise unlawful command influence." *United States v. Ayala*, 43 M.J. 296, 299 (1995). The burden of disproving [UCI] or proving that it did not affect the proceeding does not shift to the Government until the defense meets its burden of production." *Id.*

D. Appellate Standard – No UCI Beyond a Reasonable Doubt.

1. Once the issue of command influence is properly placed at issue, no reviewing court may properly affirm the findings and sentence unless [the court] is persuaded **beyond a reasonable doubt**: (1) that the predicate facts do not exist; or (2) that the facts do not constitute UCI; or (3) that the UCI did not affect the findings and sentence." *United States v. Biagase*, 50 M.J. 143 (1999).

2. "Where the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*." *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

3. There must be more than "[command influence] in the air" to justify action by an appellate court. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1473 (1992). *Accord Ayala*, 43 M.J. 296 (1995). Accused's friend submitted affidavit saying that after initial enthusiasm, most (6 of 7) of those he solicited for clemency recommendations demurred. Three judge majority (Cox, Gierke, Crawford) found it insufficient to shift burden. Key is that his affidavit lacked evidence that "anyone acting with the mantle of authority unlawfully coerced or influenced" any of the individuals approached.

4. A post-trial evidentiary hearing is not required if no reasonable person could view the opposing affidavits . . . and find the facts averred by appellant. *United States v. Dykes*, 38 M.J. 270, 172-73 (C.M.A. 1993).

5. "[T]he threshold triggering [a *DuBay*] inquiry is low, but it must be more than a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994).

E. Raising the issue at the trial level. *United States v. Biagase*, 50 M.J. 143 (1999).

1. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." The evidentiary standard is the same as required to raise an issue of fact, *i.e*. "**some evidence**."

2. The accused must show facts which, if true, constitute UCI, and that the alleged UCI has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.

3. Once raised, the burden shifts to the Government, which may rebut the defense case by proving "beyond a reasonable doubt" that "(1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not affect the proceedings"

F. Dismissal is last resort.

1. "If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it) and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed." *Jones*, 30 M.J. at 845. *Accord United States v. Thomas*, 22 M.J. 388 (1986), *United States v. Martinez*, 42 M.J. 333 (1995).

2. *United States v. Gore*, 60 M.J. 178 (2004). "Because the military judge here decided that the command influence could not be cured and dismissed the charges with prejudice, we . . . address a different issue than that presented in *Biagase* and *Rivers*, where the trial proceeded after remedial action by the military judge. We now consider whether the military judge erred in fashioning the remedy for the unlawful command influence that tainted the proceedings. We will review the remedy ordered by the military judge in this case for an abuse of discretion." It was within the MJ's discretion to determine that dismissal with prejudice was the appropriate remedy in light of the "egregious conduct of the CA that prejudiced Appellant's court-martial."

G. Recent reinforcement:

United States v Francis, 54 M.J. 636 (Army Ct. Crim. App. 2000). Appellant asserted that comments from his squad leader and platoon leader to other soldiers in his unit that they should not associate with appellant, and that appellant should be separated from rest of soldiers constituted UCI. He asserted that military judge erred by failing to shift the burden of persuasion to the government. The squad leader and platoon leader testified regarding their intent. Other soldiers testified regarding their interpretation of what they heard. These soldiers stated they were willing to testify on appellant's behalf; defense counsel stated he had no evidence of unfairness. Military judge found actions of squad and platoon leaders UCI, but there was no showing of how or why the proceedings were unfair. Nonetheless, the military judge put several *Rivers/Biagase* type remedial measures in place. The court found that the burden of persuasion never shifted because appellant failed to show "proximate cause" or "logical connection" between the actions of squad and platoon leaders and some unfairness at trial. The appellate court disagreed with the findings and legal analysis of the military judge, but reached the same conclusion. Based on conclusion that there was no UCI, the Court sharply criticized the remedial measures put into effect by the military judge.

H. Pretrial publicity and the standard.

U.S. v. Simpson, 58 M.J. 368 (2003). Appellant was convicted of various offenses to include rape, indecent assaults, indecent acts, and maltreatment of trainees at Aberdeen Proving Ground. He contended that he was denied a fair trial because of apparent UCI and unfair pretrial publicity permeated his case. As support, appellant cited the Army's "zero tolerance" policy on sexual harassment; a chilling effect on the command decision-making process stemming from the Secretary of the Army's creation of the Senior Review Panel to examine gender relations; public statements made by senior military officials suggestive of appellant's guilt; and public comments by members of Congress and military officials regarding the "Aberdeen sex scandal." The Court held that the appellant did not meet his burden under *Biagase* that the statements were unlawful command influence and, alternatively, Government demonstrated that media stories and statements by senior officials did not taint the court-martial.

XIV. WAIVER.

A. *United States v. Drayton*, 45 M.J. 180 (1996); *United States v. Brown*, 45 M.J. 389 (1996). *Accord United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). (Court unanimously affirms conviction, but two judges dissent from analysis.). Majority approach for future cases.

1. Forfeited if not raised at trial:

   a. Accuser disqualification;

   b. Commander coerced into signing charges, (charges are treated as unsworn); and

   c. Pressure to make a certain recommendation in the transmittal process.

2. Not waived by failure to raise at trial. Improper influence at:

   a. Referral;

   b. Trial; or

   c. Post-trial review.

3. Items in 1.(a) - (c) above are not waived if there is an allegation that the party was deterred by unlawful command influence from challenging the defects at trial. *But see United States v. Dingis*, 49 M.J. 232 (1998) where there was no indication that the alleged UCI prevented the accused from discovering this information prior to trial

B. **Old Rule**: UCI motion "is not waived by failure to raise it at trial." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994), *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983) (note, however, that it carefully sidesteps the applicability of Art. 37 to the adjudicative phase).

C. Not jurisdictional: "[E]ven in egregious case[s] of unlawful] command influence," the court has refused to find the error is jurisdictional. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994) (citing *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983)).

D. Unsettled Issue: *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994) (2-1-1-1). Fractured court affirms conviction, but three judges struggle over whether accused can affirmatively halt/waive post-trial Article 39(a) inquiry into allegations of unlawful command influence in order to protect favorable PTA.

E. Waiver as Part of Pretrial Agreement.

United States v. Weasler, 43 M.J. 15 (1995). Accused had made (accurate) motion that acting commander improperly signed charges, at direction of commander who was going on leave, and therefore did not exercise independence. While government preparing to respond to motion, defense offered to plead guilty. Held: issue is waiveable by defense, so long as knowing, freely initiated. Strong disagreement in scathing concurrences from Judges Sullivan and Wiss, who suggest that majority setting standard of "tolerable" UCI.

XV. CURRENT ISSUES, PROJECTIONS, OPINIONS.

A. UCI is correctable.

B. UCI (at least accusative stage) is waiveable – expressly (*Weasler*) and by omission.

C. Contemporary concerns.

1. "Vision statements," "transition briefings," and policy letters.

2. Good faith paternalism: smothering advice on possible consequences of pet area of misconduct (*e.g.*, drugs, sexual harassment).

3. Deployments: Rear detachment commands pose > threats for UCI.

4. "High-profile" cases where senior military leadership make public comments regarding pending investigations and trials.

5. Commander’s increased unfamiliarity with (and reduced confidence in) military justice system.

6. “Zero defects” as applied to courts-martial.

7. Mentoring properly regarding good order and discipline and the military justice system.

THE 10 COMMANDMENTS OF UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1:	**THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.**
COMMANDMENT 2:	**THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.**
COMMANDMENT 3:	**THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.**
COMMANDMENT 4:	**THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.**
COMMANDMENT 5:	**NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.**
COMMANDMENT 6:	**WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.**
COMMANDMENT 7:	**THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.**
COMMANDMENT 8:	**RECOGNIZE THAT SUBORDINATES AND STAFF MAY "COMMIT" COMMAND INFLUENCE THAT WILL BE ATTRIBUTED TO THE COMMANDER, REGARDLESS OF HIS KNOWLEDGE OR INTENTIONS.**
COMMANDMENT 9:	**THE COMMANDER MAY NOT HAVE AN INFLEXIBLE ATTITUDE TOWARDS CLEMENCY.**
COMMANDMENT 10:	**IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.**